No. 90-1078

In The

Supreme Court of the United States

October Term, 1990

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, JR.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
JOHN M. GROEN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES CITED

Page

CASES

TABLE OF AUTHORITIES CITED – Continued

RULES

MISCELLANEOUS

TABLE OF AUTHORITIES CITED – Continued

Page

No. 90-1078

In The

Supreme Court of the United States

October Term, 1990

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, JR.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

This motion of Pacific Legal Foundation (PLF) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 37. Written consent to the filing of this brief has been granted by counsel of record for petitioners and has been lodged with the clerk of this Court. Consent has

been withheld by counsel for respondent, City and County of Honolulu.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth Amendment to the United States Constitution.

The opinion below holds that a cause of action for inequitable precondemnation activities merely states a "type" of regulatory takings claim. In order to prevail on such a claim, the court below requires that economically viable use of the property be denied. Amicus believes this construction of takings jurisprudence is fundamentally incorrect and is in direct conflict with the recent land use decisions of this Court. Moreover, amicus believes the ruling poses a serious threat to the integrity of private property rights and the constitutional prohibition against the taking of private property without just compensation.

For the foregoing reasons, Pacific Legal Foundation requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: March 7, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
JOHN M. GROEN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

By _____
EDWARD J. CONNOR, Jr.

Attorneys for Amicus Curiae

No. 90-1078

In The

Supreme Court of the United States

October Term, 1990

RICHARD LYMAN, JR., MATSUO TAKABUKI, MYRON B. THOMSON, WILLIAM S. RICHARDSON, HENRY H. PETERS, JR.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

This case involves a 20 year effort to develop the area known as Queen's Beach, a 210-acre parcel of land at the northeasterly end of the Hawaii Kai community in the City and County of Honolulu (city). Appendix to Petition for Writ of Certiorari (Pet. App.) at E 3. The petitioners are the trustees of the Bernice Pauahi Bishop Estate (Bishop Estate), which owns the Queen's Beach property. The right to develop the parcel is held by Kaiser Hawaii Kai Development Company (Kaiser) through a contractual arrangement with Bishop Estate. Pet. App. at E 2.

The complete chronology of facts involving the development efforts for Queen's Beach is provided in the petition for writ of certiorari (Pet.) and need not be repeated here. *See* Pet. at 3-15. Amicus will limit its recounting to the essential facts related to the arguments presented by amicus.

Throughout the 1960s and 1970s, Queen's Beach was designated in the Honolulu general plan as a resort and commercial area. Pet. App. at E 4. Consistent with this general plan designation, Kaiser planned to build a hotel/resort complex on the property. *Id.* Numerous efforts to secure development approval were submitted but each was rebuffed by the city. Ultimately, in 1983 and 1984, the general plan and zoning designations for the property were changed to preservation and parkland. *Id.*

This lawsuit followed.[1] Among other claims, Bishop Estate alleged that the city's land use restrictions effected

---

[1] The original plaintiff in this action is Kaiser Hawaii Kai Development Company. Petitioners, Trustees of (continued)

a taking without just compensation. The District Court identified two separate takings theories pursued by Bishop Estate. First, a taking was alleged based on denial of all economically viable use of Queen's Beach. The alternative ground for a taking alleged that the city engaged in inequitable precondemnation activities. Pet. App. at E 7-9.

In support of the inequitable precondemnation activities theory, Bishop Estate maintains that the city has been on a mission to acquire Queen's Beach for a park since 1970. Pet. App. at E 6. In order to accomplish that objective, Bishop Estate contends that the city attempted to impose unreasonable exactions requiring dedication of oceanfront property for use as a public park; that the city downzoned the parcel and downgraded the allowable density to depress the acquisition price; and that the city's policy has been to freeze development at Queen's Beach until it could be acquired for a public park. Pet. App. at E 6-7. Bishop Estate maintains that these actions amounted to inequitable precondemnation activities for which compensation is due. *See Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1147 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983).

The District Court determined that the takings claim based on denial of economically viable use was not ripe under this Court's standards developed in *Williamson County Regional Planning Commission v. Hamilton Bank,*

Bishop Estate, are plaintiffs/intervenors. Kaiser has filed its own petition for writ of certiorari which this amicus also fully supports.

473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986). Pet. App. at E 35.

As to the inequitable precondemnation activities claim, the District Court was not hampered by the *Williamson County* finality requirement. The District Court explained that claims based on denial of economically viable use necessarily require a final decision of the type and intensity of use permitted. In contrast, a takings claim based on inequitable precondemnation activities does not involve an inquiry into the available uses of a parcel, but instead focuses on the inequitable purposes of government conduct. The District Court stated: "An analysis of beneficial uses is irrelevant, however, to a claim for inequitable precondemnation activities." Pet. App. at E 37. The District Court therefore concluded that the inequitable precondemnation activities theory was not subject to the finality requirement and was ripe for consideration. Bishop Estate could proceed to prove its allegations at trial.[2]

At the close of the evidence offered by Bishop Estate, the District Court granted the city's motion for a directed verdict. The basis for the directed verdict was that Bishop Estate had not proven that economically viable use of the

---

[2] The District Court's opinion does not address whether the inequitable precondemnation activities claim is subject to the requirement that compensation be first sought in state court. This omission from the opinion however is of no consequence since Hawaii state law does not recognize a right to compensation based on inequitable precondemnation activities. *See* Pet. App. at 27 (citing *City and County of Honolulu v. Chun*, 54 Haw. 287, 288-89, 506 P.2d 770, 773 (1973)).

property was denied. Pet. App. at C 5. The ruling, however, directly contradicted the District Court's prior analysis that an inquiry into the beneficial uses of a parcel is "irrelevant" to an inequitable precondemnation activities claim.

The Ninth Circuit affirmed and repeated the notion that an inequitable precondemnation activities claim requires a showing that economically viable use has been denied.

> "A cause of action for inequitable precondemnation activities merely states a type of regulatory takings claim. Recent Supreme Court cases unequivocally indicate that the government does not take an individual's property unless it has ' "denie[d] [him] economically viable use of his land." ' " Pet. App. at B 9 (brackets in original).

The petition for writ of certiorari in part asks this Court to consider whether denial of economically viable use is required to be proven when a takings claim is based on inequitable precondemnation activities. More specifically, when a municipality takes actions to delay or freeze development and engages in unreasonable and extortionate exaction demands for purposes which are not based on good faith regulatory objectives but are geared toward future public acquisition of the property for free or substantially below market value, does the owner present sufficient support for a taking claim even if some vestige of remaining use might be available? The court below said the answer is no.

REASONS FOR GRANTING THE PETITION

I

THE DECISION BELOW CONFOUNDS AND MISAPPLIES THIS COURT'S TAKINGS JURISPRUDENCE

A. This Court Has Consistently Recognized That Regulatory Actions Affecting Property Must Be for Legitimate Regulatory Purposes

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court established that a land use regulation effects a taking if it does not substantially advance legitimate state interests, *or* denies the owner economically viable use of the land. These tests are stated in the disjunctive thereby providing alternative grounds on which to base a taking. *Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984) ("[i]n *Agins*, the Supreme Court identified two means by which a 'taking' may occur").

On several other occasions this Court has reaffirmed that to avoid a taking, government actions abridging property rights must be for legitimate regulatory purposes. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 127 (1978) ("may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., dissenting) (majority did not reach takings merits; Justice Scalia recognized taking claim based on failure to advance legitimate regulatory purposes).

Most significant is *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where this Court concluded that an exaction of a public access easement was unrelated to any legitimate regulatory purpose and therefore amounted to a taking without just compensation. Relying on the "substantially advance legitimate state interests" test in *Agins*, this Court characterized leveraging of the police power to obtain unrelated dedications an "out-and-out plan of extortion" which was well beyond the "outer limits" of legitimate state interests. *Id.* at 837.

B. Seeking to Extort Land Dedications and Downzoning or Delaying Development So As to Depress Property Values and Thereby Acquire a Public Park Without Payment of Compensation Is Not a Legitimate Purpose of Regulation

Nollan is clear that extortion and leveraging of the police power are not legitimate regulatory objectives. Likewise, numerous decisions recognize that actions intended to depress property values for future acquisition are inequitable activities for which compensation is required. *See, e.g., Joint Ventures, Inc. v. Department of Transportation*, 563 So. 2d 622, 625-27 (Fla. 1990), and cites therein; *Klopping v. City of Whittier*, 8 Cal. 3d 39, 52 (1972); *Martino v. Santa Clara Valley Water District*, 703 F.2d at 1147, and cites therein.

C. Takings Claims Based on Improper Regulatory Actions Do Not Require Proving Denial of Economically Viable Use

As stated above, the *Agins* formulation states two separate tests on which a taking may be based. *Nollan* is

particularly clear that the "substantially advance" test analyzes the conduct of government and seeks to determine whether legitimate regulatory purposes are advanced.[3] The fact that some economically viable use for the parcel might remain simply has no bearing whatsoever on whether or not the conduct of government went beyond the limits of legitimate regulatory objectives.

Nollan hammers this point down firmly. This Court recognized that the California District Court of Appeal rejected Nollans' taking claim because the public access condition "did not deprive them of all reasonable use of their property." *Nollan*, 483 U.S. at 830 (citing *Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 723 (1986)). In other words, the California appellate court in *Nollan* relied on reasoning identical to that of the Ninth Circuit in the present case. But this Court's takings conclusion in *Nollan*, which was based on an analysis of the *conduct* of the Coastal Commission, was not influenced in any way by the fact that the Nollans could build their

---

[3] In *Nollan* this Court stated: "[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them." *Nollan*, 483 U.S. at 837.

The opinion continued, "where the actual conveyance of property is made a condition to the lifting of a land use restriction . . . there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* at 841.

house if they succumbed to the permit condition. Similarly, any remaining economically viable use of Queen's Beach is irrelevant to the claim that the city engaged in inequitable conduct and extortionate activities for the purpose of depressing values and acquiring a public beach on the cheap.

D. Under the Federal Practice of Notice Pleading, It Makes No Difference Whether the Claim Is Labeled As Inequitable Precondemnation Activities, or As a Nollan Extortion/Exaction Claim, or As Simply a Failure of the Regulation to Substantially Advance Legitimate Governmental Purposes

The practice in federal court is notice pleading. *American Timber & Trading Co. v. First National Bank of Oregon*, 690 F.2d 781, 786 (9th Cir. 1982). It does not matter what labels were assigned to Bishop Estate's claims as long as the city received fair notice of the nature and basis of those claims. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 714 (8th Cir. 1979). Here, the city was very aware that Bishop Estate sought compensation based on the city's extortionate policies and other inequitable activities designed to depress property values in order to acquire a public park. Those facts are a proper basis for a takings claim under the first *Agins* test and the *Nollan* decision. Recovery cannot now be denied simply because a particular label may or may not have been ascribed to the claim by the District Court.

II

THE DECISION BELOW TYPIFIES THE NECESSITY FOR THIS COURT TO PROVIDE FURTHER GUIDANCE IN THE TAKINGS FIELD

A. As Illustrated by the Decision Below, Many Lower Federal and State Courts Are Struggling with, and Misinterpreting, This Court's Takings Jurisprudence

Four years have passed since this Court's landmark 1987 rulings in the takings field. Despite those notable efforts, lower courts continue to apply takings theories in a haphazard and nonprincipled manner.

The decision below illustrates the problem of a lower court latching onto a single phrase or standard, in this case "economically viable use," and rejecting a takings claim on that basis alone without consideration of the nature or type of takings claim being presented. More troubling is the fact that this is not an isolated aberration. In *Moore v. City of Costa Mesa*, 886 F.2d 260 (9th Cir. 1989), an exaction of property for street widening purposes was ruled invalid but compensation was nevertheless denied because the illegal exaction did not preclude all economic use of the entire property. *Id.* at 264. Similarly, in *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), the Third Circuit rejected a taking claim even though the city denied building permits for "partisan political or personal reasons unrelated to the merits of the application for the permits." *Id.* at 1129. Ignoring the *Agins* and *Nollan* first prong test, that court reasoned that arbitrary refusal to issue building permits was not a compensable taking since "all use" was not denied and the owners "retained

the right to put their land to a variety of alternative uses." *Id.* at 1131.

In contrast with *Moore, Bello,* and the decision below, the Eleventh Circuit recognizes a compensable taking when a property owner is subject to arbitrary building prohibitions even though alternative uses may be available. *Wheeler v. City of Pleasant Grove,* 746 F.2d 1437 (11th Cir. 1984) (*Wheeler II*); *Wheeler v. City of Pleasant Grove,* 833 F.2d 267, 270 (11th Cir. 1987) (*Wheeler III*). *See also A.A. Profiles, Inc. v. City of Ft. Lauderdale,* 850 F.2d 1483, 1487-88 (11th Cir. 1988).

Other courts struggle at an even more fundamental level. For example, in *Presbytery of Seattle v. King County,* 114 Wash. 2d 320, 787 P.2d 907 (Wash. 1990), the Washington Supreme Court created a new and radical "threshold inquiry" which redefines takings claims into substantive due process claims. 787 P.2d at 912. By insulating a whole class of regulation from Takings Clause scrutiny, and limiting the legal analysis to a so-called, noncompensable substantive due process test, the Washington court was able to circumvent the compensation requirement upheld in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987). The Washington court summarized the effect of its ruling this way:

> "Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body, a situation about which we have previously expressed concern. . . . Accordingly, many challenges to land use regulations will most appropriately be analyzed under a due process formula rather than under a 'taking' formula." *Presbytery,* 787 P.2d at 913-14.

The degree of conflict among the state and federal courts can be appreciated by comparing the takings analysis in the above-referenced decisions (including the opinion below) with the takings analysis employed by the highest court of New York in *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059 (1989). Whereas the Washington court in *Presbytery* strived to create a new threshold inquiry in an attempt to avoid takings altogether, *Seawall Associates* applies this Court's precedents in a straightforward manner. The divergent takings analysis applied by these two states illustrates the tremendous lack of uniformity among courts.

B. The Time Has Arrived for This Court to Revisit the Takings Clause and Forcefully Clarify the Principles and Analysis To Be Applied by Lower Courts

If left unchecked, takings jurisprudence will continue to unravel into utter chaos. The decision below will surely be cited as precedent in other cases and the error here will be repeated and compounded. Numerous respected commentators have appropriately recognized the confusion now besetting regulatory takings law. *See* Mandelker and Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 Land Use Law and Zoning Digest 3 (Jan. 1990); Settle, *Regulatory Takings Doctrine in Washington: Now You See It, Now You Don't*, 12 U. Puget Sound L. Rev. 339 (1989); Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 Zoning and Planning Report 57 (Sept. 1990).

The public interest strongly supports a principled and consistent interpretation of the constitutional limitation presented by the Takings Clause of the Fifth Amendment. This Court is the only body which can fulfill that immediate need. There should not be one rule in the State of Washington and another in the State of New York; nor should there be one rule in the Ninth Circuit and another in the Eleventh Circuit.

C. The Decision Below Presents an Excellent Opportunity for This Court to Clarify Takings Jurisprudence and Principles

The decision below applies the "economically viable use" test to a takings claim which should not involve considerations of the beneficial uses available for a parcel. Accordingly, resolution of this case will require setting forth the principles which underlie the various takings tests employed by this Court. Specifically, this case provides an opportunity for clarifying and distinguishing between the alternative takings tests established in *Agins* and applied in *Nollan*. Such clarification would be of great benefit to property owners and regulators seeking to understand the scope of the constitutional protection against uncompensated takings.

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to grant the petition for writ of certiorari.

DATED: March, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
JOHN M. GROEN
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae